Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

82-1195

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

DALE F. MEYER, on behalf of himself and all others similarly situated,
Petitioner,

VS.

THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC., UCA SYSTEMS, INC., JAMES L. MILLER, and GERALD P. KOOYERS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' UCA SYSTEMS, INC. AND GERALD P. KOOYERS BRIEF IN OPPOSITION

RICHARD SCOTT BURRISS
COUNSEL OF RECORD
BURRISS, LOWMAN & RICE
201 San Antonio Circle,
Suite 160
Mountain View, CA 94040
Telephone: (415) 948-7127
Attorney for Respondents UCA Systems, Inc. and Gerald P. Kooyers

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTION PRESENTED

Whether the Petitioner's discretionary commodities futures account, managed by a commodity trading advisor licensed under and subject to the disclosure, record keeping and other regulatory provisions of the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, is a security required to be registered under the Securities Act of 1933.

TABLE OF CONTENTS

	Page
Question presented	i
Statutes involved	1
Statement of the case	1
Argument	3
1. The exclusive jurisdiction provision of the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, Precludes Application of the Federal Securities Laws	3
2. The Commodity Exchange Act provides adequate protection	6
3. There is no common enterprise in this case	11
A. Hortizontal commonality	13
B. Vertical commonality	16
(i) Ninth Circuit Approach	16
(ii) Fifth Circuit Approach	18
Conclusion	20

TABLE OF AUTHORITIES CITED

Cases

Page

Bartels v. International Commodities Corp., 435 F. Supp. 865 (D. Conn. 1977) 5

Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 317 (S.D. Ohio 1979) 5

Booth v. PB Company Commodities Services, 430 F.2d 132 (CA-8 1970) 13

Brodt v. Bache & Co., 595 F.2d 459 (9th Cir. 1978) ..13, 16, 17

Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., ... U.S. ....., 102 S.Ct. 1825 (1982) 3, 4, 6, 7, 9, 13, 14

E.F. Hutton & Co. v. Schank, 456 F.Supp. 507 (D.Utah, 1976) 5

Gonzalez v. Paine, Webber, Jackson & Curtis, Inc., Comm.Fut.L.Rep. ¶ 21,615 (S.D.N.Y. Nov. 4, 1982) 5

Hirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1977) 13, 14

Hofmayer v. Dean Witter & Co. 459 F.Supp. 733 (N.D. Cal. 1978) 5

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) 6, 9, 10, 20

Marine Bank v. Weaver, ... U.S. ....., 102 S.Ct. 1220 (1982) 9, 10, 11, 15, 19, 20

Meredith v. ContiCommodity Serv., Inc., 2 Comm.Fut. L.Rep. (CCH) ¶ 21,107, 24,462 (D.D.C. Nov. 24, 1980) 14

Miller v. Central Chincilla Group, Inc., 494 F.2d 414 (8th Cir. 1974) 13

Milnarik v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir. 1972), cert. denied, 408 U.S. 887 .....13, 14

TABLE OF AUTHORITIES CITIES

CASES

Page

Mordaunt v. Incomco, 686 F.2d 815 (9th Cir. 1982) 16

R.J. Hereley & Son Co. v. Stotler & Co., 466 F.Supp. 213 (D. Kan. 1979) 5

SEC v. American Commodity Exch., Inc., 546 F.2d 1361 (10th Cir. 1976) 4

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) 12

SEC v. Continental Commodities Corp., 497 F.2d 516 (5th Cir. 1974) 13, 18, 19

SEC v. Glenn W. Turner Enterprises, 474 F.2d 476, n.7 (9th Cir.), cert. denied, 414 U.S. 821 (1973) 16

SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974) 18

SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 12

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959) 12

SEC v. W.J. Howey, Co., 328 U.S. 293 (1946) 11, 12, 13, 15, 18

Tcherepnin v. Knight, 389 U.S. 332 (1967) 11, 12

United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) 11, 12

Wasnovic v. Chicago Board of Trade, 352 F.Supp. 1066 (M.D.Pa. 1972), affirmed mem., 491 F.2d 752 (3rd Cir., 1973), cert. denied, 416 U.S. 994 (1974) 13, 14

Table of Authorities Cited

Statutes

	Page
Commodity Futures Trading Commission Act of 1974, P.L. 93-436, 88 Stat. 1389	3, 4, 6, 20
Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865	5
88 Stat. 1393-1394	8
7 U.S.C. (Commodity Exchange Act):	
§§ 1 et seq.	1, 5, 6, 7
§§ 1-24	6, 10
§ 2	1, 3, 20
§ 4a(j)	7
§ 4b	9
§ 5(d)	9
§ 6a	9
§ 6b	7, 9
§ 6o(1)	7
§ 7a(11)	8
§ 7a(12)	8
§ 7b	7
§ 7(d)	9
§ 8(a)	7
§ 9	7
§ 9(b)	9
§ 12c	7
§ 13a	8
§ 13(a)(c)	8
§ 13(b)	8, 9
§ 18	8
§ 18a	8

Table of Authorities Cited

Statutes

	Page
15 U.S.C. (Securities Act of 1933):	
§ 77(b)	11
§ 77(b)(1)	1, 3, 10, 11, 16, 17
§ 77e(c)	1, 3, 10
§ 78i(b)	7
29 U.S.C. (Employee Retirement Income Security Act of 1974):	
§ 1001	9
§ 1381	9
46 F.R. 26004 (1981)	7

Other Authorities

CFTC Interpretative Letter No. 77-2 [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,257, at 21,371 (Jan. 14, 1977)	6
H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933)	11
H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974) U.S. Code Cong. & Admin. News 1974, p. 5843	7
H.R. Rep. No. 1383, 93d Cong., 2d Sess. 35, reprinted in [1974] U.S. Code Cong. & Ad. News 5894, 5897	5
H.R. 13113, 93d Cong., 2d Sess., 201 (1974)	4
S. Rep. No. 850, 95th Cong., 2d Sess. 21, reprinted in [1978] U.S. Code Cong. & Ad. News 2087	5

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

DALE F. MEYER, on behalf of himself and
all others similarly situated,
Petitioner,

VS.

THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC.,
UCA SYSTEMS, INC., JAMES L. MILLER, and
GERALD P. KOOYERS,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

RESPONDENTS' UCA SYSTEMS, INC. AND GERALD P. KOOYERS BRIEF IN OPPOSITION

Respondents, UCA Systems, Inc. and Gerald P. Kooyers, adopt, for the purposes of this Memorandum, the material in Petitioner's Petition under the headings, "Opinions Below" and "Jurisdiction."

STATUTES INVOLVED

The relevant provisions of section 2(a)(1) of the Commodity Exchange Act, as amended by the Commodity Futures Trading Act of 1974, 7 U.S.C. § 2, and sections 2 and 5 of the Securities Act of 1933, 15 U.S.C. §§ 77b(1) and 77e(c), are set forth in the Appendix (App. A).

STATEMENT OF THE CASE

This case was decided on undisputed facts:

Respondent Gerald P. Kooyers, ["Kooyers"], was the president and sole shareholder of Respondent UCA Systems, Inc. ["UCA"] a California corporation. (Second Augmented Excerpt of Record, Affidavit of Gerald P. Kooyers in Support of Motion to Dismiss Complaint or in the Alternative to Grant Summary Judgment, 22:21-22). UCA, through Kooyers, was licensed as a commodity trading advisor with the Commodity Futures Trading Commission, pursuant to the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* (*Id.* 22:22-26)

On August 12, 1977, Petitioner Dale Meyer entered into a Commodity Advisor Investment Advisory Agreement, ["Advisory Agreement"] for the principal purpose of investing in commodity futures contracts (CR 8, First Amended Complaint, Exhibit A),[1] opened a commodity account with Thomson McKinnon Securities, Inc., ["Thomson"], (CR 59, Deposition of Dale F. Meyer, taken October 24, 1978, 73:18-74:8), deposited $40,000.00 into his commodity account at Thomson (CR 8, Exhibit A), and executed a limited power of attorney authorizing UCA to order

[1] "CR" refers to the original record filed in the court of appeals.

trades in his commodity account (CR 59, Deposition of Dale F. Meyer, taken October 24, 1978, 74:9-24).

Although Petitioner's Advisory Agreement (the terms of which are set forth in Appendix B) expressly granted UCA exclusive authority to direct Thomson to execute transactions, (App. B), Petitioner initially directed UCA as to which portfolio of commodities to invest in, and retained the right to modify the Commodity Trading Portfolio at his sole discretion. *(Id.* paragraph 2). Petitioner had the right, in his sole discretion, to withdraw funds from his commodity account at any time (*Id.*, paragraph 1). The Advisory Agreement was terminable at will by either Petitioner or UCA (*Id.*, paragraph 4). In compensation for the services rendered to him by UCA, Petitioner agreed to pay UCA, in advance, a quarterly fee equal to six (6%) percent of the value of his assets being managed by UCA at the beginning of each quarter *(Id.*, paragraph 8). There was no contractual provision for increasing or decreasing the fee as a function of profits or losses incurred in Petitioner's account, and the Advisory Agreement did not provide for a refund or proration in the event of termination before the end of any quarter (*Id.*, paragraph 4). The Advisory Agreement expressly provided for all commissions or expenses arising from transactions or functions exercised in administration of the account to be charged to Petitioner's account (*Id.*, paragraph 5).

In November 1977, Petitioner terminated his Advisory Agreement with UCA because he had not realized a net profit in his account every month (CR 59, Deposition of Dale F. Meyer, taken October 24, 1978, 102:26-103:13). Petitioner's account had a net trading loss of Six Thousand Two Hundred Ninety-Eight Dollars and Fifty Cents ($6,298.50) including brokerage commissions and management fees. (CR 24, Exhibit A to UCA's Answers and Objections to Plaintiff's First Set of Interrogatories).

ARGUMENT

The decision below, holding that the Petitioner's discretionary commodities futures trading account is not a "security" within the meaning of 15 U.S.C. § 77b(1), nor required to be registered under section 5 of the Securities Act of 1933, 15 U.S.C. § 77e(c), is plainly correct.

1. The Exclusive Jurisdiction Provision of the Commodity Exchange Act, as Amended by the Commodity Futures Trading Commission Act of 1974, Precludes Application of the Federal Securities Laws

The exclusive jurisdiction provision, section 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. § 2, as amended by the Commodity Futures Trading Commission Act of 1974, P.L. 93-436, 88 Stat. 1389, precludes the registration of discretionary commodities futures trading accounts under section 5 of the Securities Act of 1933, 15 U.S.C. § 77e(c). Section 2(a)(1) granted the Commodity Futures Trading Commission ["CFTC"] ". . . exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery . . . ." 7 U.S.C. § 2. Since only commodity futures are purchased by the Petitioner's discretionary futures commodities trading account, it is certainly within the preemptive language.

The legislative history of the Commodity Future Trading Commission Act of 1974 clearly supports the exclusive jurisdiction of the CFTC over discretionary commodities accounts. As this Court noted in *Curran v. Merrill Lynch, Pierce, Fenner & Smith,* ..... U.S. ..... 102 S.Ct. 1825, 1843 (1982): "The purpose of the exclusive jurisdiction provision in the bill passed by the House was to separate functions of the Commission [CFTC] from those of the Securities Exchange Commission and other regulatory

agencies." (Bracketed material added, footnotes omitted). The provision in the bill passed by the House provided as follows:

> Provided, that the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery . . .: *And provided further,* That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States . . ." H.R. 13113, 93d Cong., 2d Sess., 201 (1974), *cited in Curran, supra,* 102 S.Ct. at 1843, n.81.

While the House version may have allowed limited joint jurisdiction by the Securities Exchange Commission ["SEC"] and the CFTC over some aspects of commodity futures trading, the Senate amended the House provision "in an attempt to avoid unnecessary overlapping and duplicative regulation." Staff of Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess., The Commodity Futures Trading Commission Act of 1974, at 6 (Comm. Print 1974), *quoted in SEC v. American Commodity Exch., Inc.,* 546 F.2d 1361, 1368 (10th Cir. 1976).

The Conference accepted the Senate amendment. The legislative history reveals the scope of the CFTC's exclusive jurisdiction intended by Congress:

> The *Senate* amendment retains the provision of the *House* bill but adds three clarifying amendments. The clarifying amendments make clear that (a) the Commission's jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options; (b) the Commission's jurisdiction, where applicable, supersedes State as

well as Federal agencies; and (c) Federal and State courts retain their respective jurisdictions.

. . . .

Under the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned. H.R. Rep. No. 1383, 93d Cong., 2d Sess. 35, *reprinted in* [1974] U.S. Code Cong. & Ad News 5894, 5897.

The legislative history of the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865, which amended the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.*, further confirmed the exclusive nature of the CFTC's jurisdiction, stating that the CFTC was designed "to avoid duplication and confusion in the regulation of futures trading." S. Rep. No. 850, 95th Cong., 2d Sess. 21, reprinted in [1978] U.S. Code Cong. & Ad. News 2087, 2109.

The exclusive jurisdiction of the CFTC has been upheld repeatedly against attempts at regulation by other federal administrative and legislative authorities. *See Gonzalez v. Paine, Webber, Jackson & Curtis, Inc.*, COMM.FUT.L.REP. ¶ 21,615 (S.D.N.Y. Nov. 4, 1982); *Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 317, 319 (S.D. Ohio 1979); *R.J. Hereley & Son Co. v. Stotler & Co.*, 466 F.Supp. 213 (D. Kan. 1979); *Hofmayer v. Dean Witter & Co.* 459 F.Supp. 733 (N.D. Cal. 1978); *Bartels v. International Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977).

As the Court in *E.F. Hutton & Co. v. Schank*, 456 F.Supp. 507 (D.Utah, 1976) stated at page 513:

> . . . there is little reason to attempt to construe *Howey* so as to include discretionary commodities accounts within the bailiwick of the securities act and the SEC. Indeed, because of the exclusive jurisdiction which Congress granted the CFTC over "accounts,

agreements, and transactions involving contracts of sale of a commodity for future delivery," it would fly in the face of express congressional intent to do so.

The CFTC's Office of General Counsel has also stated that Section 2(a)(1) of the Commodity Exchange Act vests the CFTC with "exclusive jurisdiction with respect to accounts, agreements, and transactions involving commodity futures contracts, both discretionary and non-discretionary, and that the exclusivity of its jurisdiction is not affected by whether the account agreement or transaction might otherwise be viewed as a 'security'." CFTC Interpretative Letter No. 77-2 [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,257, at 21,371 (Jan. 14, 1977).

2. The Commodity Exchange Act Provides Adequate Protection

The express Congressional intent to grant the CFTC exclusive jurisdiction, 7 U.S.C. § 2, and the comprehensive legislation regulating the commodity futures trading markets under the Commodity Exchange Act, 7 U.S.C. §§ 1-24, as amended by the Commodity Futures Trading Commission Act of 1974, P.L. 93-436, 88 Stat. 1389, (hereinafter collectively referred to as "CEA"), "severely undercuts all arguments for extending the Securities Acts", *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 569, (1979), (discussed at greater length, commencing at p. 9 of this brief) to discretionary commodities futures trading accounts. The scope of the regulation affording protection to the investor in a discretionary commodities futures trading account under the CEA obviates any reason to require these accounts to be registered under the Securities Act of 1933. As this Court noted in *Curran,* ..... U.S. ....., 102 S.Ct. 1825 (1982): "The Commodity Exchange Act (CEA), 7 U.S.C. § 1 *et seq.* (1976 ed. and Supp. III), has been aptly characterized as 'a comprehensive reg-

ulatory structure to oversee the volatile and esoteric futures trading complex'." 102 S.Ct. at 1827, (footnote omitted), *quoting* H.R. Rep. No. 93-975, 93d Cong. 2dSess. 1 (1974) U.S.Code Cong. & Admin. News 1974, p. 5843.

Petitioner's discretionary commodities futures trading account was to be managed by a registered commodity trading advisor, UCA. UCA was both regulated and registered by the CFTC. See Sections 2(a)(1), 4b, 4c, 4l, 4m, 4n, 4o, 8a, and 19 of the CEA, 7 U.S.C. §§ 2 *et seq.* The CFTC is vested with rule making authority to govern its operating procedures, 7 U.S.C. § 4a(j)(1976), and has enacted rules specifically designed to protect those who invest through discretionary commodities accounts. In many respects, the commodities provisions are patterned after the securities laws. Since the enactment of the Commodity Futures Trading Commission Act of 1974, the CFTC has continually expanded the disclosure rules governing discretionary commodities future accounts, which are currently embodied in 46 F.R. 26004 (1981). The CEA also contains several antifraud provisions. The main antifraud provision is section 4b of the CEA, 7 U.S.C. § 6b (1976). As this Court noted in *Curran*, ... U.S. ....., 102 S.Ct. 1825 (1982): "The language of § 4b is similar to that of § 10(b) of the Securities Act of 1934, 15 U.S.C. § 78i(b) . . ." 102 S.Ct. at 1845. Section 4o(1) covers fraud with respect to commodity trading advisors and commodity pool operators. 7 U.S.C. § 6o(1) (1976).

The adequacy of the CEA enforcement provisions precludes the need for commodity investors' private actions under the federal Securities Acts. The CFTC's enforcement powers include the authority to withdraw or suspend a board of trade's designation as a contract market, 7 U.S.C. §§ 7b, 8(a) (1976), and deny violators access to the markets, *Id.* §§ 9, 12c. In addition, the CFTC may seek injunctions or restraining orders in the courts, *Id.* § 13a-1,

assess fines up to $100,000, *Id.* § 13a, disapprove contract market bylaws, rules and regulations, *Id.* § 7a(12), and refer criminal violations of the CEA to the Department of Justice, *Id.* § 13a. Moreover, the Department of Justice can seek imposition of criminal penalties up to $100,000. *Id.* at 13(a)-(c), 13b.

In addition to CFTC enforcement, private parties have an administrative remedy known as a reparation proceeding. 7 U.S.C. § 18 (1976). Under section 14(a) of the amended CEA aggrieved commodity investors may bring complaints of alleged violations of the Act or of CFTC regulations before an administrative law judge. *Id.* § 18(a). Under the reparations mechanism, the CFTC has the authority to award money damages. *Id.* § 18.

Additionally, section 5a(11) of the CEA provides investor recourse to arbitration. 7 U.S.C. § 7a(11) (1976). Under said section commodity exchanges are required to "provide a fair and equitable procedure through arbitration or otherwise . . . for the settlement of customers' claims and grievances against any member or employee [of the exchange]" (bracketed material added). The procedure applies only to claims involving less than $15,000, and is designed to encourage the speedy resolution of smaller customer disputes at the exchange level. (Petitioner's loss totaled $6,298.50. *Supra*, p. 2 of this brief). The 1974 amendments also included a new section 14 that expressly authorizes actions for money damages. See 88 Stat. 1393-1394. This adjudicatory procedure apparently is designed to resolve larger disputes or smaller section 5a(11) disputes that are not settled. The actions are brought before the CFTC rather than before an exchange. There is no limit on the amount of damages that may be awarded. The Commission's judgments are enforceable by actions in federal district court. 7 U.S.C. § 18 (1976).

This Court's recent decision in *Curran*, ... U.S. ....., 102 S.Ct. 1825 (1982), holding that Congress intended the federal courts to recognize implied causes of action under five separate provisions of the CEA provides still another means for investor recourse. (The five sections are §§ 4a, 7 U.S.C. § 6a; 4b, 7 U.S.C. § 6b; 5(d), 7 U.S.C. § 7(d); and 9(b), 7 U.S.C. § 13(b).) Thus, the remedies and enforcement provisions available under the CEA made the application of the federal Securities Acts to commodity transactions unnecessary and inappropriate.

This Court's recent decisions in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979) and *Marine Bank v. Weaver*, ... U.S. ....., 102 S.Ct. 1220 (1982), by analogy, may be interpreted as limiting the jurisdiction of the federal Securities Acts in the area of discretionary commodity accounts.

In *Daniel, supra*, this Court held that a noncontributory, compulsory pension plan was not a security. One of the reasons for the holding in *Daniel* was that the pension plan was regulated by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1976): "The existence of this comprehensive legislation governing the use and terms of employee plans severely undercuts all arguments for extending the Securities Act to noncontributory, compulsory pension plans." *Daniel, supra*, 439 U.S., at 569-570, *quoted in Marine Bank, supra*, 102 S.Ct. at 1224, n.7. "Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirements of the federal securities laws as well." *Marine Bank, supra*, 102 S.Ct. at 1224 n.7, explaining *Daniel, supra*.

Similarly, in *Marine Bank, supra*, this Court held that a certificate of deposit issued by a federally regulated bank was not a security, "since the holders of bank certificates

of deposit are abundantly protected under the federal banking laws." *Id.* 102 S.Ct. at 1225. As this Court explained:

> "This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation." *Id.* 102 S.Ct. at 1224. (footnotes omitted)

The analogy to Petitioner's discretionary commodities futures trading account is compelling. The comprehensive legislation regulating the commodity futures markets under the CEA, 7 U.S.C. §§ 1-24, similarly "severely undercuts all arguments for extending the Securities Acts", *Daniel, supra,* 439 U.S. at 569, to discretionary commodity accounts.

This Court's decisions in *Daniel, supra,* and *Marine Bank, supra,* specifically reject the propriety of extending the operation of the Securities Acts to an area in which Congress has established an independent regulatory scheme. Congressional intent to establish a comprehensive scheme of regulation of discretionary commodities futures trading accounts under the CEA, 7 U.S.C. §§ 1-24, thus operates as a bar to the judicial expansion of the jurisdictional scope of the federal Securities Acts.

The decision below, holding that Petitioner's discretionary commodities futures trading account is not a "security" within the meaning of 15 U.S.C. § 77b(1), nor subject to registration under section 5 of the federal Securities Act of 1933, 15 U.S.C. § 77e(c), is plainly correct. Both *Daniel, supra,* and *Marine Bank, supra,* by pragmatically

defining the word "security" have dampened an overly broad application of the Securities Act of 1933. By referring to so called "modern finance theory", Petitioner attempts to erode well established principles of federal Securities Laws. The Securities Act of 1933 should not be used as a tool to reach instruments not "within the ordinary concept of a security". H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933); *quoted in Marine Bank, supra,* 102 S.Ct. at 1223, *United Housing Foundation, Inc. v. Forman* 421 U.S. 837, at 849-850 (1975). SEC registration of discretionary commodities futures trading accounts does not advance the interests of the investor, but merely serves as an unjustified duplication of efforts under the federal scheme of regulation.

3. There Is No Common Enterprise in This Case

The decision below, holding that Petitioner's discretionary commodities future trading account was, as a matter of law, not a "security" under the Securities Act of 1933, 15 U.S.C. § 77(b), because there was no "common enterprise" is entirely consistent with, is indeed compelled by, an entire line of United States Supreme Court cases.

The term "security" is defined in section 2(1) of the 1933 Securities Act, 15 U.S.C. § 77b(1), to mean, *inter alia,* any "investment contract". The classic test in determining whether a particular financial relationship constitutes an investment contract was formulated by this Court in *SEC v. W.J. Howey, Co.,* 328 U.S. 293, 301 (1946): "[t]he test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." This test is to be applied in light of "the substance—the economic realities of the transaction —rather than the names that may have been employed by the parties." *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 851-852, (1975). *Accord, Tcherepnin v. Knight,* 389 U.S. 332, 336, (1967); *Howey, supra,* 328 U.S.,

at 298. *Cf. SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 80 (1959) (Brennan, J., concurring) ("[O]ne must apply a test in terms of the purposes of the Federal Acts . . . .")

In *Forman, supra*, this Court observed that the *Howey* test, "embodies the essential attributes that run through all of the Court's decisions defining a security". 421 U.S., at 852. This Court restated that "the touchstone [of an investment contract] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." (bracketed material added) *Id.*, 421 U.S. at 852.

In every decision of this Court recognizing an "investment contract" as a "security" under the Securities Act there has always been the element of a "common enterprise." *See e.g. SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, (1943) (land and participation in a common oil exploration enterprise) *SEC v. W.J. Howey*, 328 U.S. 293, (1946), (units of a citrus grove development coupled with a common service contract for cultivating, marketing and remitting net proceeds to the investor); *SEC v. Variable Life Ins. Co.*, 359 U.S. 65, (1959) (variable annuity contract which entitled purchasers to pro rata participation in a common investment portfolio); *Tcherepnin v. Knight*, 389 U.S. 332, (1967) (bank capital stock with voting rights and dividends dependent upon profits from money lending operations); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, (1967) (variable component of mixed variable and fixed annuity contract). Even in those cases wherein the interest acquired had intermingled security and nonsecurity aspects, the interest obtained had "to a very substantial degree, elements of investment contracts . . ." *Variable Annuity Life Ins. Co., supra*, 359 U.S. at 91, (Brennan, J., concurring).

Under the *Howey* test, the critical factor in the instant case is the lack of a common enterprise.

The courts have adopted two conflicting approaches in defining the common enterprise element of the *Howey* test. They have expressed the two approaches in terms of either "horizontal" or "vertical" commonality. The terms refer to the nature of the investment relationship required to satisfy the common enterprise element. In the Third, Sixth and Seventh circuits, only "horizontal" dependence among the investors will satisfy common enterprise. See, *e.g., Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), *aff'd on other grounds*, ... U.S. ..... 102 S.Ct. 1825 (1982); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977); *Wasnovic v. Chicago Board of Trade*, 352 F.Supp. 1066 (M.D.Pa. 1972), *aff'd.*, 491 F.2d 752 (3rd Cir., 1973), *cert. denied*, 416 U.S. 994 (1974); *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972), *cert. denied*, 408 U.S. 887. However, the Fifth, Eighth and Ninth Circuits satisfy the common enterprise requirement upon finding the presence of "vertical" dependence between an investor and the promoter. *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974); *Miller v. Central Chinchilla Group, Inc.*, 494 F.2d 414 (8th Cir. 1974); *Booth v. PB Company Commodities Services*, 430 F.2d 132 (CA-8 1970); *Brodt v. Bache & Co.*, 595 F.2d 459 (9th Cir. 1978).

A. Horizontal Commonality

The horizontal approach focuses on the relationship among investors. Under the horizontal approach, the success or failure of one investor must be dependent upon the success or failure of his promoter's other investors. The leading case embodying this approach is *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972), *cert. denied*, 408 U.S. 887, holding that a discretionary commodities account did not state a claim for the sale of an unregistered security:

> We find the element of commonality absent here. Although the Complaint does allege that Nelson entered into similar discretionary arrangements with other customers, the success or failure of those other contracts had no direct impact on the profitability of plaintiffs' contract. Nelson's various customers were represented by a common agent, but they were not joint participants in the same investment enterprise. *Id.*, 457 F.2d. at 276-277.

The *Milnarik* reasoning and results have been followed in a substantial line of cases involving discretionary commodities accounts. *See, Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), *aff'd on other grounds*, ... U.S. ....., 102 S.Ct. 1825 (1982); *Wasnovic v. Chicago Board of Trade*, 352 F.Supp. 1066 (M.D. Pa. 1972), *aff'd.*, 491 F.2d 752 (3rd Cir., 1973), *cert. denied*, 416 U.S. 994 (1974); *Hirk v. Agri-Research Council Inc.*, 561 F.2d 96 (7th Cir. 1977).

Several courts following the horizontal approach have held that a pooling of the investors' funds constitutes horizontal commonality. See e.g., *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 622 F.2d at 222; *Meredith v. ContiCommodity Serv., Inc.*, 2 COMM.FUT.L. REP. (CCH) ¶ 21,107 at 24,462 (D.D.C. Nov. 24, 1980); *Wasnovic v. Chicago Board of Trade, supra*, 352 F.Supp. at 1069. In addition, at least two courts have held that the promoter must actually pool the funds rather than merely treat each investor's funds similarly. *See Hirk v. Agri-Research Council, Inc., supra*, 561 F.2d at 101; *Meredith v. ContiCommodity Serv., Inc., supra*, 2 COMM.FUT.L.REP. (CCH) ¶ 21,107 at 24,462-63.[3]

---

[3]It should be noted that, at page 3 of Petitioner's Petition for Certiorari, in the Statement of the Case, the assertion that all accounts managed by UCA were traded uniformly based on computerized signals is not supported by a reference to the record or appendices.

The roots of the horizontal approach are found in *SEC v. W. J. Howey, Co.*, 328 U.S. 293, (1946). In *Howey*, the fruit which the citrus trees yielded was collectively brought to market and sold. The proceeds were shared by the investors in proportion to the number of citrus trees a particular investor owned and not the yield of the individual trees situated on his land. As this Court noted in *Howey, supra,*:

> "Without the consent of the company, the land owner or purchaser has no right of entry to market the crop; thus there is ordinarily no right to specific fruit. The company is accountable only for an allocation of the net proceeds upon a check made at the time of picking. All the produce is pooled by the respondent companies, which do business under their own names." 328 U.S. at 296.

Consequently, the fortunes of the investors were linked to each other through the success or failure of a single venture, the marketing of the harvested citrus. Under these circumstances a common enterprise was found to exist.

Further support for the horizontal approach can be found in this Court's recent decision in *Marine Bank v. Weaver*, ... U.S. ....., 102 S.Ct. 1220 (1982). In *Marine Bank*, this Court discussed factors relevant in determining whether a "security" exists under the federal Securities Acts. Among other things, this Court stated that the instruments found to be securities involved "offers to a number of potential investors", *Id.*, 102 S.Ct. at 1225, and were ones in which there was "common trading". The decision in *Marine Bank*, supports the application of the horizontal standard to satisfy the "common enterprise" element of an investment contract, and appears to have rejected the vertical standard.

Respondents UCA and Kooyers respectfully submit that the horizontal approach to commonality is correct and consistent with the entire line of United States Supreme Court cases applying the *Howey* test. The decision below, holding

that the Petitioner's discretionary commodities futures trading account was as a matter of law, not a "security" under the Securities Act of 1933, 15 U.S.C. § 77b(1), because there was no "common enterprise" is plainly correct under the horizontal approach to commonality since: (1) there was no pooling of the Petitioner's account; and (2) the commodity trading advisor did not share in the profits because: (a) its fee was paid in advance each quarter and (b) the Petitioner was free to withdraw the profits.

B. Vertical Commonality

On the other hand, the Fifth, Eighth and Ninth Circuits have applied a less restrictive common enterprise standard known as "vertical" commonality. The vertical approach shifts the focus from the relationship among investors to the relationship between each investor and the promoter. There is disagreement, however, between the Circuits over the nature of the relationship between promoter and investor necessary to support a finding of vertical commonality.

(i) Ninth Circuit Approach

The Ninth Circuit, which requires only vertical commonality, has defined common enterprise as "one in which the 'fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.'". *Brodt v. Bache & Co. Inc.*, 595 F.2d 459, 460 (9th Cir. 1979) (quoting *SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 n.7 (9th Cir.), *cert. denied*, 414 U.S. 821, (1973)). Since, in a discretionary commodities account, the promoter merely furnishes investment counsel to another for a commission, and there is no direct correlation between the investor's profits and losses and the promoter's business, the Ninth Circuit has held that there is no common enterprise and it is therefore not a security. *See Brodt v. Bache & Co., Inc., supra; Mordaunt v. Incomco*, 686 F.2d 815 (9th Cir. 1982).

As the Ninth Circuit Court explained in *Brodt v. Bache & Co., Inc., supra,* 595 F.2d at 462:

> Our case comes to this. Using the classic definition of *Howey,* there existed an "investment" by the appellant, the profits from which were "to come solely from the efforts of others." The investment, however, was not in a "common enterprise." It was in commodity futures. Appellant's enterprise was a "solitary" one. His profits were shared neither with other investors nor the appellee; whether his investment flourished or perished was unrelated directly to either the general financial health of the appellee or the ability of the appellee to perform a duty, the purpose of which would be "to secure" to some extent the appellant's investment. Merely furnishing investment counsel to another for a commission, even when done by way of a discretionary commodities account, does not amount to a "common enterprise."

Applying the Ninth Circuit's approach to vertical commonality, the Petitioner's discretionary commodities futures trading account is clearly not a "security" under the Securities Act of 1933, 15 U.S.C. § 77b(1), because it lacked the element of a "common enterprise". As the Court below explained:

> . . . just as in *Mordaunt* and *Brodt,* the promoter continued to profit through commissions even as the account lost money. On the other hand, had the account been successful, the promoter would not necessarily have shared the benefits because Meyer could elect to withdraw profits as they accrued. Judged in the light of economic realities, this account was no different from those at issue in *Mordaunt* and *Brodt* and therefore does not qualify as a security within the meaning of 15 U.S.C. § 77b. (Petition for Certiorari, App. B p. A-5)

(ii) Fifth Circuit Approach

The Fifth Circuit approach to vertical commonality is clearly incorrect. *In SEC v. Koscot Interplanetary, Inc.* 497 F.2d 473, 478 (5th Cir. 1974), the Court held that the critical factor in the common enterprise test "is not the similtude or coincidence of investor input, but rather the uniformity of impact of the promoter's efforts." *In SEC v. Continental Commodities, Corp.*, 497 F.2d 516 (5th Cir. 1974), the Court interpreted the *Koscot* treatment of common enterprise as rejecting "the proposition that the pro rata sharing of profits is critical to a finding of commonality . . . and cast[ing] aspersions on the elevation of a pooling ingredient to the exalted status in the inquiries concerning a common enterprise." *Id.*, 497 F.2d at 522 (bracketed material added, citations omitted). The Fifth Circuit rephrased the "critical inquiry" as "whether the fortuity of the investments collectively is essentially dependent upon promoter expertise." *Id.* The Court then found this test satisfied in the case of a discretionary commodities trading account because "the success of the trading enterprise as a whole and customer investments individually is contingent upon the sagacious investment counseling of Continental Commodities." *Id.*

The Fifth Circuit's approach to common enterprise is so broad as to render the *Howey* test's common enterprise element redundant of the *Howey* test's additional element of an expectation of profits based solely on the efforts of another. The Fifth Circuit has shifted from the requirement of a common venture between the investor and the promoter to a requirement only of investor dependence upon promoter expertise. *SEC v. Continental Commodities Corp., supra*, 497 F.2d at 522-23. The *Howey* test concerns, however, as a distinctly separate element a correlation between the investor's expectation of profits and the efforts of the promoter. By its interpretation of the *Howey* test,

the Fifth Circuit has effectively eliminated the common enterprise element.

The Fifth Circuit approach to vertical commonality is so broad as to include agreements that clearly are not a security. For example, the agreement in *Marine Bank*, 102 S.Ct. 1220 (1982), which gave the guarantors 50% of the corporation's net profits would fit the Fifth Circuit's definition of a security. "[T]he agreement gave the Weavers a share in the profits of the slaughterhouse which would result from the efforts of the Piccirillos." *Marine Bank v. Weaver, supra,* ..... U.S. ....., 102 S.Ct. at 1225. The success of the enterprise was clearly dependent upon the expertise of the Piccirillos in running the slaughterhouse. But the United States Supreme Court reached the opposite conclusion, holding that: "[a]lthough the agreement gave the Weavers a share of the Piccirillos' profits, if any, that provision alone is not sufficient to make that agreement a security." *Id.*, 102 S.Ct. at 1225. Thus the Fifth Circuit's approach to vertical commonality is clearly incorrect.

Finally, it should be noted that the Fifth Circuit's decision in *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974), was based on facts which occurred prior to the enactment of the Commodity Futures Trading Commission Act of 1974. The analysis supporting the decision in *Continental Commodities*, and the line of cases following its analysis therefore must be reappraised in terms of the present regulatory structure of the CEA.

CONCLUSION

Respondents UCA and Kooyers respectfully suggest that the Court either deny certiorari or affirm the decision below holding that the Petitioner's discretionary futures trading account was not a security required to be registered under the Securities Act of 1933. The decision below is plainly correct. Section 2(a)(1) of the CEA, 7 U.S.C. § 2, as amended by the Commodity Futures Trading Commission Act of 1974, P.L. 93-436, 88 Stat. 1389, granted the CFTC exclusive jurisdiction over discretionary futures trading accounts. Additionally, *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551 (1979), and *Marine Bank v. Weaver,* ..... U.S. ....., 102 S.Ct. 1220 (1982), bar expansion of the concept of a security in the instant case since the Petitioner was adequately protected under the comprehensive regulatory structure of the CEA. Lastly, there was no "common enterprise" in this case.

Dated: February 11, 1983

Respectfully submitted,

Richard Scott Burriss
Burriss, Lowman & Rice
Attorney for Respondents
UCA Systems, Inc. and
Gerald P. Kooyers

(Appendices follow)

Appendix A

Section 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. § 2:

> . . . *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further,* That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. . . .
>
> . . . The words "the Commission" shall mean the Commodity Futures Trading Commission established

under section 4a of this title. The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided,* That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession. . . .

Section 2, Securities Act of 1933, 15 U.S.C. § 77b(1):

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferrable share, *investment contract,* voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to sub-

scribe to or purchase, any the foregoing. (Emphasis added.)

Section 5, Securities Act of 1933, 15 U.S.C. § 77e(c):

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . .

Appendix B

COMMODITY ADVISORS
INVESTMENT ADVISORY AGREEMENT

This Investment Advisory Agreement, hereinafter referred to as the "Agreement," is made and entered into this *12** day of *August*, 19*77*, by and between UCA Systems Inc., a California corporation, hereinafter referred to as the "Advisor," and *Dale F. Meyer*, hereinafter referred to as the "Client."

WHEREAS, the Client has speculative capital for the principal purpose of investing in commodity futures contracts and has been informed and is fully cognizant of the possible high risks associated with commodity investments:

NOW, THEREFORE, in consideration of the foregoing the parties hereto agree as follows:

1. The Client shall deposit with *Thomson McKinnin Securities*, hereinafter called the "Broker," those funds and securities referred to as the "Initial Deposit," in the amount of *$40,000.00*, to be managed by the Advisor. At his sole discretion the Client may withdraw funds from his commodity accounts; provided, however, that should his withdrawals reduce his commodity equity below the Initial Deposits, as set forth above, the Advisor may at his sole discretion terminate the account. The Advisor shall be given written notice in advance of all such withdrawals.

2. The Advisor will cause commodity contracts to be bought, sold, sold short, and spread, and will have exclusive authority to issue all other necessary instructions to the Broker. All such transactions shall be for the account and risk of the Client and shall be limited by the current Commodity Trading Portfolio, a copy of which is attached

*Handwritten portions are indicated by being italicized.

hereto and incorporated herein by this reference. The Client may at any time prior to termination of this Agreement, upon written notice to the Advisor, modify the Commodity Trading Portfolio. Upon such written notice, such revised Portfolio shall be deemed to be incorporated into this Agreement. The "commodity contracts" referred to above shall be deemed to include commodity futures contracts and cash deliveries on futures contracts.

3. The Advisor's services are not deemed exclusively for the Client and the Advisor shall be free to render similar services to others.

4. This Agreement shall remain in effect until terminated by written notice of either party to the other. Such notice shall have no effect upon commitments made for the account before such termination. The management fee will not be refunded or prorated in the event of termination of the agreement. Upon termination of this Agreement, trading of the Managed Assets shall be the sole responsibility of the Client.

5. The Client's account shall be charged for all commissions or expenses arising from transactions or functions exercised in the administration of the account.

6. The Advisor will send the Client a monthly statement giving an appraisal of the account at market value.

7. This contract may not be assigned by either party without the written consent of the other.

8. In compensation for all of the services to be rendered under this Agreement, the Client agrees to pay the Advisor a quarterly fee of *6%* of the Managed Assets in advance. Managed Assets shall be valued as of the last Friday of the month (or previous trading day if markets are closed on Friday) of *February, May, August,* and *November,* and shall be deemed to include all equity in

regulated and non-regulated commodity accounts plus any securities used to meet margin requirements on any commodity trading exchange.

9. The Advisor may direct the broker to invest cash held in the Managed Commodity Account in government obligations or direct its placement in any savings and loan institution for any period of time desired by the Advisor. Additionally, the Client hereby authorizes the Advisor and the Broker upon presentation of the Advisor's monthly statement as described in Paragraph 3 above, to deduct from the cash in said account the Advisor's fee and forward the same to the Advisor.

10. The Client agrees to hold the Advisor harmless from any liability incurred by the Client in trading commodity future contracts through the Managed Commodity Account. In no event shall the commodity advisor be held responsible for any of the Client's obligations in purchasing or selling commodity future contracts or for brokerage fees connected with the same. Client acknowledges that risks are inherent in trading commodity future contracts and acknowledges that the Advisor makes no guarantees that his services will result in a profit to the Client. The Advisor will not be liable to the client for any action taken by the Advisor save for the Advisor's wilful misconduct or gross negligence in the performance of his duties under this Agreement.

11. Should any dispute arise between the Client, and the Advisor relating to this Agreement or the performance hereunder, the parties to this Agreement covenant that they will submit to arbitration said dispute and further that said arbitration will be accomplished by the Committee of Arbitration established by the rules and regulations of the Board of Trade of the City of Chicago, in particular Rule 180 and following.

12. This Agreement is subject to and will be performed in accordance with the provisions of the California Corporations Code, the rules and regulations of the Commissioner of Corporations of the State of California; appropriate statutes of the United States of America and rules and regulations of the Department of Agriculture, Commodity Exchange Authority.

13. The parties to this Agreement covenant and agree to execute all documents necessary to the performance and implementation of this Agreement.

CLIENT:
Name: *Dale F. Meyer*

Address:
7481 Rollingdell Dr.
San Jose 95129 Ca.
P.O. Box 1022
Cupertino 95014

ADVISOR:
UCA SYSTEMS INC.

by *Gerald P. Kooyers*
Gerald P. Kooyers
President

UCA SYSTEMS INC.
COMMODITY TRADING PORTFOLIO

Client understands that an initial position consists of *three* contracts or less of any of the following Commodities and that as equity increases on such initial position and subsequent additions, because of a changing contract price, additional contracts are added up to the maximum as listed below.

Commodity	Maximum Positions
Wheat	75,000 bushels
Corn	75,000 bushels
Soybeans	50,000 bushels
Soybean Oil	12 contracts
Soybean Meal	12 contracts
Silver	12 contracts
Live Cattle	12 contracts
Live Hogs	12 contracts
Copper	12 contracts
Cotton	8 contracts

CLIENT:
Name:
Dale F. Meyer
Address:
7481 Rollingdell Dr.
San Jose, 95129 CA
Date *12 Aug. 77*
P.O. Box 1022
Cupertino 95014

ADVISOR:
UCA SYSTEMS INC.

By: */s/ Gerald P. Kooyers*
Gerald P. Kooyers
President

Date *August 12, 1977*